



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OGC-2019-0685; FRL-10003-78-OGC]

Proposed Settlement Agreements, Clean Water Act Claims

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with the Environmental Protection Agency (EPA)

Administrator's October 16, 2017 Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements, notice is hereby given of three proposed settlement agreements to address petitions for review of EPA's final National Pollutant Discharge Elimination System (NPDES) general permits for discharges of stormwater from Small Municipal Separate Storm Sewer System (MS4) in Massachusetts and New Hampshire under Clean Water Act (CWA). The proposed settlements represent the results of mediation supervised by the U.S. Court of Appeals for the District of Columbia Circuit Mediation Program between EPA and petitioners the National Association of Homebuilders (NAHB), the Home Builders and Remodelers Association of Massachusetts, Inc. (HBRAMA), the New Hampshire Home Builders Association (NHHBA), the Center for Regulatory Reasonableness (CRR), the Massachusetts Coalition for Water Resources Stewardship (MCWRS), the Town of Franklin, Massachusetts, (Franklin), the City of Lowell, Massachusetts (Lowell), the Conservation Law Foundation (CLF), and the Charles River Watershed Association (CRWA). Two of the proposed settlement agreements include commitments for EPA to propose certain modifications to the 2016 Massachusetts Small MS4 General Permit

and the 2017 New Hampshire Small MS4 General Permit, and then to take final action on each proposal. The third settlement agreement commits EPA to process an individual small MS4 permit application from the City of Lowell, Massachusetts.

DATES: Written comments on the proposed settlement agreements must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments, identified by Docket ID number EPA-HQ-OGC-2019-0685, online at www.regulations.gov (EPA's preferred method). For comments submitted at www.regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from www.regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA generally will not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact the persons identified in the "For Further Information Contact" section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Peter Z. Ford, Water Law Office, Office of General Counsel, (2355A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone: (202) 564-5593; email address: ford.peter@epa.gov; or Erin Flannery-Keith, Office of Regional Counsel, Region 1, Environmental Protection Agency, 5 Post Office Square, Boston, MA 02109; telephone: (617) 918-1096; email address: flannery-keith.erin@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Settlement Agreements

On April 4, 2016, EPA issued a final NPDES general permit for discharges of stormwater from small MS4s in Massachusetts (the MA MS4 Permit) under Clean Water Act (CWA) section 402(p). 33 U.S.C. 1342(p). On July 18, 2016, the Center for Regulatory Reasonableness (CRR) filed a petition for review of the permit in the U.S. Court of Appeals for the D.C. Circuit. CLF, CRWA, MCWRS, Franklin, NAHB, HBRAMA, and the City of Lowell also filed petitions for review of the permit, all of which were consolidated with CRR's petition in the D.C. Circuit. *Center for Regulatory Reasonableness, et al. v. EPA*, No. 16-1246 (D.C. Cir.) (2016 Massachusetts Small MS4 General Permit consolidated cases). On January 18, 2017, EPA issued a final NPDES general permit for discharges of stormwater from small MS4s in New Hampshire (the NH MS4 Permit). On February 1, 2017, CLF filed a petition for review of the permit in the U.S. Court of Appeals for the First Circuit. CRR, NAHB, and NHHBA later filed petitions for review in the D.C. Circuit. The First Circuit then transferred the

CLF petition to the D.C. Circuit, where the D.C. Circuit consolidated it with the CRR, NAHB, and NHHBA petitions. *Center for Regulatory Reasonableness et. al v. EPA, Conservation Law Foundation, Intervenor* No. 17-1060 (D.C. Cir.) (2017 New Hampshire Small MS4 General Permit consolidated cases). The parties to both cases entered into mediation in 2017, and the D.C. Circuit has held the cases in abeyance during that time. The first two proposed settlement agreements describe the modifications that EPA would propose to the MA MS4 Permit and NH MS4 Permit. The proposed permit modifications would reflect the substantive agreements that parties reached during mediation. The agreements also specify that EPA would take final action on each proposed modification within nine months of the Agency's posting of the notice of availability (NOA) of the Draft Permit Modifications on its website and in the Federal Register; that petitioners would then dismiss their current petitions for review with prejudice; and that petitioners would agree not to challenge EPA's respective final actions if they modify the permits in a manner substantially similar to the proposed modifications (with one exception, discussed in the New Hampshire settlement agreement). The third settlement agreement commits Lowell, Massachusetts to voluntarily dismiss its petition without prejudice and commits EPA to process Lowell's individual permit application and then to take final action on Lowell's individual permit application, taking into consideration Lowell's application materials, public comments, and any additional information obtained in the course of the permit proceeding, in accordance with 40 CFR part 124.

For a period of thirty (30) days following the date of publication of this action, the Agency will accept written comments on the proposed settlement agreements from persons who are not named as parties or intervenors to the litigation in question. If so requested, EPA will also consider holding a public hearing on whether to enter into the proposed settlement agreements. EPA or the Department of Justice may withdraw or withhold consent to the proposed settlement agreements if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines that consent to these proposed settlement agreements should be withdrawn, EPA will agree to the terms of the proposed settlement agreements and so inform the Court.

In this action, EPA is soliciting comment only as to whether to enter the settlement agreements. EPA's planned proposed permit modifications to the Massachusetts and New Hampshire permits and statements of basis describing those proposed modifications are attached as Exhibits A and B to the Massachusetts and New Hampshire settlement agreements. EPA will subsequently offer the public the opportunity to comment on those proposed permit modifications pursuant to the regular permitting process as specified in 40 CFR part 124. The parties may execute the settlement agreements after this 30-day public notice period concludes. Following any Office of Management and Budget (OMB) review of the proposed Massachusetts and New Hampshire permit modifications, EPA will promptly transmit for publication in the

Federal Register notices of availability (NOAs) of the proposed modifications to the two permits that are the same as the documents marked Exhibit A to both the Massachusetts and New Hampshire proposed settlement agreements, excepting non-substantive or typographical corrections. EPA will post the Draft Permit Modifications and accompanying fact sheets, see 40 CFR 124.8, that include the language attached as Exhibit B to both the Massachusetts and New Hampshire proposed settlement agreements, on EPA Region 1's website. The NOAs will explain that EPA is reopening and reexamining specific parts of the permits. EPA will email notifications of the Draft Permit Modifications to regulated parties, the parties to this mediation, and the other interested parties on EPA Region 1's NPDES permit mailing list. The NOAs will provide for at least a 30-day public comment period that may, in EPA's discretion, be extended. Pursuant to 40 CFR 124.12(a), if EPA determines that there is a significant degree of public interest in the Draft Permit Modifications, EPA may schedule a public hearing and publish a notice of hearing on the same webpage as the NOAs. In addition, at the time EPA submits the NOAs for publication, EPA will ask Massachusetts and New Hampshire to provide a water quality certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. 1341. After considering any public comments, EPA will take final action on the Draft Permit Modifications ("Final Agency Action") within nine months of the Agency's posting of the NOAs of the Draft Permit Modifications on its website.

Regarding the proposed settlement agreement between EPA and the City of Lowell, Massachusetts, EPA similarly requests only comments on the settlement agreement. The proposed settlement agreement would commit EPA to take final action on Lowell's individual permit application in accordance with 40 CFR part 124, including providing public notice of any draft permit and offering opportunities for public comments and, if requested, public hearings on the permit's substantive requirements.

II. Additional Information About Commenting on the Proposed Settlement Agreements

A. How can I get a copy of the proposed settlement agreements?

The official public docket for this action (identified by EPA-HQ-OGC-2019-0685) contains copies of the proposed settlement agreements. The official public docket is available for public viewing at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Docket Center is (202) 566–1752.

An electronic version of the public docket is available through www.regulations.gov. You may use www.regulations.gov to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select “search.” It is important to note that EPA's policy is that public comments, whether submitted

electronically or in paper, will be made available for public viewing online at www.regulations.gov without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket.

EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for

clarification, EPA may not be able to consider your comment.

Use of the www.regulations.gov website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (e-mail) system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through www.regulations.gov, your e-mail address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: December 18, 2019.

Steven M. Neugeboren,
Associate General Counsel.

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